No. 76-1508

In the Supreme Court *of the United States*

OCTOBER TERM, 1976

VERNON EGGE,

Petitioner,

vs.

CHARLES DAVIS, Public Utility Commissioner of the State of Oregon.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OREGON

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INDEX

NOTE: Rule 23 (1) (j), Supreme Court Rules, directs that there be "appended to the petition a copy of the judgment or decree in question and any order upon rehearing" when review of a state court judgment or decree is sought. No such order, judgment or decree, is here appended because none is ordinarily issued by the Orgon Supreme Court in cases like petitioner's. Reference to denial of petitioner's PETITION FOR REVIEW is found at 277 Or. 99, ... P2d ..... (1977).

CITATIONS

Cases:

Statutes:

Other:

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Vernon Egge, the petitioner and respondent below, petitions for a writ of certiorari to review the judgment of the Oregon Supreme Court in the above-entitled proceedings.

OPINIONS BELOW

The only opinion in the case is the majority opinion of the Oregon Court of Appeals, written by Justice Thornton. *Egge vs. Davis*, 27 Or. App. 383, 556 P2d 153 (1976). *See*, Appendix A.

JURISDICTION

Petitioner seeks review of the judgment of the Oregon Supreme Court which was entered on February 1, 1977, denying petitioner's PETITION FOR REVIEW. The jurisdiction of this court is invoked under 28 U.S.C. §1257 (3). *See, Baxtrom vs. Herold*, 383 U. S. 107, 108, 86 S.Ct. 760, 761, 15 L.Ed.2d 620, 622 (1966).

QUESTION PRESENTED

Petitioner was specially audited, partially at his place of business, by the Public Utility Commissioner of the State of Oregon, and assessed $7,948.30 in highway use taxes. Petitioner was then mailed a notice of the assessment and his statutory right to a hearing regarding the assessment. The notice, mailed to petitioner's regular business address, failed to reach petitioner and was returned to the Commissioner.

The question presented is:

> Did the notice afforded petitioner meet standards of Constitutional due process where the Commissioner had precise knowledge of petitioner's address and actual knowledge that an initial notice to petitioner was not received?

STATUTES INVOLVED

Section 767.855 (1), Volume 5, page 1193, Oregon Revised Statutes, provides:

> "(1) Any person against whom an assessment is made under O.R.S. 767.840 or 767.850, may petition the commissioner for a reassessment thereof within 30 days after service upon the person of notice thereof. If such a petition is not filed within the 30-day period, the assessment becomes final at the expiration thereof. If a petition for reassessment is filed within the 30-day period the commissioner shall reconsider the assessment and, if the person has so requested in his petition, shall grant such person a hearing and give the person 10 days' notice of the time and place thereof. The commissioner has power to continue the hearing from time to time as may be necessary. The decision of the commissioner upon a petition for reassessment shall become final 30 days after service upon the person concerned of notice thereof."

Section 756.068 of Oregon Revised Statutes, Volume 5, pages 1077-1078, provides:

> "The service or delivery of any notice, order, form or other document or legal process required to be made by the commissioner may be made by mail. If by mail, service or delivery is made when the required material is deposited in the post office, in a sealed envelope with postage paid, addressed to the person on whom it is to be served or delivered, at his address as it last appears in the records of the commissioner."

STATEMENT

A. The Facts

The Public Utility Commissioner of the State of Oregon, conducted an audit, partially at petitioner's place of business, of petitioner's motor transport operations for the period of September 27, 1971, through August 31, 1974. On December 3, 1974, after the Commissioner determined the road use taxes paid by petitioner were deficient in amount, notice of the aforementioned audit and a special assessment in the sum of $7,948.30 was sent to petitioner by certified mail. Included in the same letter was notice of petitioner's right to a hearing regarding the assessment. The letter (notice) was properly addressed, however petitioner never received it.

When petitioner receives certified mail, the practice of the postal delivery service is to leave a slip in the petitioner's mailbox notifying him that a certified letter is being held for him at the post office. However, on this occasion petitioner received no notice that the Public Utility Commissioner's certified letter was being held. The post office, after holding the letter for approximately thirty days, returned the letter intact to the Public Utility Commissioner. On January 6, 1975, the letter was re-sent to petitioner by regular mail at the same address. Petitioner received the letter on January 8, 1975. Until that day, he had received no notice of the amount of the deficiency or his right to a hearing.

Two days later, petitioner, by written request, asked that the Public Utility Commissioner conduct a hearing regarding the assessment pursuant to Oregon Revised Statutes[1], §767.855. Petitioner's request for a hearing was denied on the ground that the time period allowed for filing his request had expired. The Public Utility Commissioner ruled that the time period for filing hearing requests began to run on December 3, 1974, and had thus expired on January 2, 1975 – four days before petitioner received actual notice of the special assessment.

It is also noteworthy that, prior to receipt of the notice of special assessment on January 8, 1975, petitioner made two post-audit inquiries about the audit findings, demonstrating his concern and interest in the audit result. Neither inquiry provided any information.

B. Proceedings Below

Petitioner originally filed a PETITION FOR ALTERNATIVE WRIT OF MANDAMUS in the Circuit Court of Marion County, Oregon, to compel the Public Utility Commissioner to grant petitioner a hearing regarding the special assessment.

1. Oregon Revised Statutes will be hereafter referred to as O.R.S.

Petitioner's argument at trial revealed his contention that the Commissioner's interpretation of O.R.S. §756.068 would work a deprivation of Constitutional due process (Transcript of trial, page 54 – Opening Argument). In his final statement to the court, counsel for petitioner argued, "The *Mullane* case . . . stands for the proposition that you've got to give the best notice under the circumstances. The one that's the most likely to give actual notice. . . . Here we have one respondent to whom the notice is directed. We have a substantial amount of money involved. We have actual knowledge of no notice and now we are being told that satisfies due process." (Transcript of trial, page 72 – Final Argument).

A PEREMPTORY WRIT OF MANDAMUS was issued pursuant to the order of the Circuit Court of Marion County. The order stated, "literal application of [O.R.S. §756.068] does not afford petitioner a reasonable opportunity for a hearing under the facts of this case, and that the statutes and due process of law require that petitioner be afforded the hearing sought . . ."

Upon the granting of the petition and issuance of the writ, the Commissioner appealed to the Oregon Court of Appeals. The Commissioner's sole assignment of error was:

> "The trial court erred in concluding that the literal application of the statutes does not afford the petitioner a reasonable opportunity for hearing and that due process of law requires the Commissioner to convene a hearing under the facts of this case."

To support his assignment of error, the Commissioner cited Oregon cases holding that – where notice by mail is statutorily allowed – due process is satisfied by the mere deposit of notice in the mail. *See, Stroh vs. SAIF*, 261 Or. 117, 119, 492 P2d 472, 474 (1972). Petitioner responded with the same argument advanced in the trial court, citing, *inter alia*, *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 70 S.Ct.

652, 94 L.Ed. 865 (1950), *Covey v. Town of Somers*, 351 U.S. 141, 76 S.Ct. 724, 100 L.Ed. 1021 (1956), and Amendment XIV, Constitution of the United States.

The Court of Appeals reversed the Circuit Court. *Egge v. Davis*, 27 Or. App. 383, 556 P2d 153 (1976). The court concluded that because petitioner was aware of the audit and expected notice of the result, the Commissioner's attempted mailing of notice to petitioner satisfied Constitutional due process. Though the logic of the opinion is unclear – and the holding ignores the Commissioner's actual knowledge that the petitioner did not receive notice – the court re-affirmed *Stroh v. SAIF, supra.*

Petitioner subsequently filed a PETITION FOR REVIEW with the Oregon Supreme Court. This was denied February 1, 1977. *Egge v. Davis*, 277 Or. 99, ... P2d ..... (1977).

REASONS FOR GRANTING WRIT

1. THE RULING OF THE OREGON SUPREME COURT VIOLATES THE MANDATE OF *MULLANE V. CENTRAL HANOVER BANK & TRUST CO.*

The mandate of *Mullane* is clear; notice must be more than a formalistic procedure. "The means employed must be such as one desirous of actually informing the [intended recipient] might reasonably adopt to accomplish it." *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 315, 70 S.Ct. 652, 657, 94 L.Ed. 865, 874 (1950). *Mullane* further states:

> "The fundamental requisite of due process is the opportunity to be heard [cite omitted]. This right to be heard has little reality or worth unless one is informed that the matter is pending and can choose for himself whether to appear or default, acquiesce or contest.
>
> "An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality

> is notice reasonably calculated, *under all the circumstances*, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Mullane v. Cenral Hanover Bank & Trust Co.*, 339 U.S. at 314, 70 S.Ct. at 657, 94 L.Ed. 2d, at 873 (emphasis added).

Petitioner's factual circumstances support the contention that he has been denied property without having been afforded Constitutional due process of law. *See*, Amendment XIV, Constitution of the United States. Both during the audit of his business and in subsequent months, petitioner requested from the Commissioner information as to the audit result. However, it is clear that during the statutory period in which petitioner might have filed notice of appeal from that audit, he received no notice of the result.

It is also clear that the registered letter sent to petitioner was not initially received. Instead, it was held by the post office for about thirty days before being returned to the Commissioner. Upon the Commissioner's return receipt of the unopened letter, he had actual knowledge that petitioner was both unaware of the audit result and unaware the time period had run for the filing of a request for a hearing regarding the audit.

The Commissioner also had constructive knowledge an error in mail delivery had occurred. He knew petitioner's exact address because the audit had occurred partially at petitioner's place of business. He knew also that a letter sent to that address had not been received. Despite these circumstances, the Commissioner denied petitioner's request for a hearing on the basis that the notice requirements of O.R.S. §756.068 had been met.

By their rulings, the Oregon Court of Appeals and Oregon Supreme Court have construed O.R.S. §756.068 to authorize the Commissioner's denial of petitioner's request for a hearing. Thus, petitioner contends O.R.S. §756.068 is unconstitutional

as interpreted by these courts. It is unconstitutional because – *under all the circumstances* – notice to petitioner was not calculated to be received. In light of *Mullane, supra,* it was the Commissioner's duty to 're-calculate' an effective means of notice when (a) he had precise knowledge of petitioner's address and (b) actual knowledge that an initial notice sent to petitioner was not received.

In the absence of this duty to 're-calculate', the giving of notice under O.R.S. §756.068 becomes the very *pro forma* act which *Mullane* disallows. It becomes a right with "little reality or worth."

It is revealing to note, at this point, that when the Commissioner did 're-calculate' an appropriate means of notice, the notice was received by petitioner and promptly acted upon.

2. A DECISION BY THIS COURT AFFIRMING PETITIONER'S ARGUMENT WOULD NOT REPRESENT AN EXTREME OR BURDENSOME DEPARTURE FROM CURRENT DUE PROCESS STANDARDS.

In one opinion, particularly instructive in the present case, this court has indicated that the holding of *Mullane v. Central Hanover Bank & Trust Co., supra,* is not to be interpreted narrowly. *Covey v. Town of Somers,* 351 U.S. 141, 146, 76 S.Ct. 724, 727, 100 L.Ed. 1021, 1026 (1956), concerned the service of a foreclosure notice upon a known incompetent. The court held:

> "Notice to a person known to be an incompetent who is without the protection of a guardian does not measure up to [the requirements of due process]."

Thus, *Covey* lays the ground work for petitioner's argument by holding that a notice known to be defective at the time of original service falls short of due process. Petitioner contends that the burden imposed by *Covey, supra,* upon a party sending notice must be extended to one further circumstance. That

circumstance derives only when the giver of notice has (1) actual knowledge of an intended recipient's address, and (2) also has knowledge an initial notice has not been received.

The burden imposed by such a rule would be slight, affecting only those cases in which the same result should be dictated by fairness and substantial justice, if not by law.

CONCLUSION

Petitioner, Vernon Egge, relies upon the language of *Mullane v. Central Hanover Bank & Trust Co.,* which guarantees that due process will be defined by the circumstances of a case, not by mere compliance with a statutory formula for notice. In the present circumstances, where the Public Utility Commissioner of Oregon alleges that due process is satisfied by a knowingly ineffective mailing of notice, the intervention of this court would be appropriate to bring Oregon law into compliance with the court's definition of Constitutional due process. By so doing, this court would, without substantially increasing the burden upon parties serving notice, expand established guarantees of fairness and justice.

Respectfully submitted,
LIVELY & WISWALL
By Laurence E. Thorp
Of Attorneys for Petitioner

APPENDIX A

IN THE CIRCUIT COURT
OF THE STATE OF OREGON FOR MARION COUNTY

VERNON EGGE, Petitioner, vs. RICHARD W. SABIN, Public Utility Commissioner of Oregon, Respondent.	Case No. 88776 ORDER

The above entitled matter having come on for hearing and trial on September 22, 1975, and Petitioner and Respondent having presented witnesses and evidence and exhibits, and having made statements are arguments in such trial, and the Court not being duly advised took the matter under advisement, and the Court now being duly advised in the premises, and finding that the literal application of the statutes as contended for by Respondent does not afford Petitioner a reasonable opportunity for a hearing under the facts of this case, and that the statutes and due process of law require that Petitioner be afforded the hearing sought:

NOW, THEREFORE, in accordance with ORS Chapter 34, the Clerk of the above entitled Court is directed to issue a Peremptory Writ to Respondent directing him to convene a hearing in accordance with ORS Chapter 767 concerning the assessment of Petitioner, and that he be enjoined from issuing his warrant to collect the taxes so assessed until completion of such hearing, and then in accordance only with the results of such hearing; and it is further ordered that judgment be, and the same hereby is, entered for Petitioner for Petitioner's costs and disbursements incurred herein.

DATED this 26th day of December, 1975.

/s/ Duana R. Ertsgaard
Circuit Court Judge

IN THE CIRCUIT COURT
OF THE STATE OF OREGON FOR MARION COUNTY

VERNON EGGE, Petitioner, vs. RICHARD W. SABIN, Public Utility Commissioner of Oregon, Respondent.	Case No. 88776 PEREMPTORY WRIT OF MANDAMUS

IN THE NAME OF THE STATE OF OREGON:

TO: CHARLES DAVIS, Public Utility Commissioner of Oregon

GREETING:

WHEREAS, upon trial of the issues in the above entitled action, this Court has duly found as follows:

I.

That at all times herein material Petitioner was a private carrier as defined in ORS 767.005 (6). That at all times herein material Respondent was the Public Utility Commissioner of Oregon pursuant to ORS 756.020 et seq.

II.

That Respondent, acting by and through his designated representatives audited Petitioner's motor transport operations covering the period from September 27, 1971, to August 31, 1974. That as a result of such audit, Respondent assessed Petitioner for underpayment in highway use taxes in the amount of $7,948.30 including interest and penalties.

III.

Notice of such assessment was sent to Petitioner by certified mail, return receipt requested, by letter dated December 3, 1974, by Respondent's designated representative. That such letter was returned to Respondent unclaimed. That such letter was resent to Petitioner on January 6, 1975, and received by Petitioner on January 8, 1975.

IV.

That by letter dated January 10, 1975, and received by Respondent on January 13, 1975, Petitioner requested that Respondent convene a hearing upon such assessment pursuant to ORS 767.855. Respondent has specifically denied such request and refused to convene such hearing.

V.

That, if Respondent is not restrained and enjoined from issuing his warrant for the collection of such highway use taxes, Petitioner will be irreparably harmed thereby.

VI.

Petitioner has no plain, speedy or adequate remedy at law.

NOW, THEREFORE, IN THE NAME OF THE STATE OF OREGON, you, said Charles Davis, Public Utility Commissioner of the State of Oregon, are commanded forthwith upon receipt of this Writ to convene a hearing pursuant to ORS 767.855 concerning the assessment of Petitioner referred to above and to give Petitioner an opportunity for a redetermination of the assessment in accordance with the procedure set forth in Chapter 767 of the Oregon Revised Statutes, and you are further hereby enjoined and restrained from issuing your warrant pursuant to ORS 767.865 or doing any other thing to col-

lect the taxes so assessed against Petitioner until the completion of such hearing, and then only in accordance with the determination therein.

Witnessed the Honorable Duane R. Ertsgaard, Judge of said court and the seal of said Court affixed this *26th* day of December, 1975.

CLERK OF THE CIRCUIT COURT
MARION COUNTY
By /s/ S. Marmie

APPENDIX B

THORNTON, J.

The issue in this case is the sufficiency of a "Notice of Highway Use Tax Assessment" which was sent by the defendant Public Utility Commissioner to petitioner.

The Commissioner appeals from the issuance of a peremptory writ of mandamus which held, in effect, that the Commissioner had failed to give petitioner sufficient notice of the challenged assessment.

The case arose out of the following circumstances:

The defendant Commissioner conducted a special audit of petitioner's motor transport operation to determine if petitioner was liable for additional highway use taxes. As a result of this audit, the conduct of which petitioner was aware, petitioner was assessed $7,948.30 for underpayment in highway use taxes. On December 3, 1974, a "Notice of Highway Use Tax Assessment" was sent by certified mail to the petitioner. After two attempted deliveries the post office returned the notice to the Commissioner on January 2, 1975. The notice was resent by regular mail on January 6, 1975, and received by petitioner on January 8, 1975. On January 10, 1975, petitioner sent a letter to the Commissioner requesting a hearing pursuant to ORS 767.855. The Commissioner refused to convene a hearing relying on the fact that the request for a hearing was not filed within 30 days of the mailing of notice as required by ORS 767.855(1). Petitioner then filed for a writ of mandamus to require the Commissioner to convene a hearing. As already indicated, the main issue in the trial court was the sufficiency of the notice. The trial court held that "the literal application of the statutes as contended for by Respondent does not afford Petitioner a reasonable opportunity for a hearing under the facts of this case, and that the statutes and due process of law require that Petitioner be afforded the hearing sought." This appeal followed.

The Commissioner is required to give written notice of special audit assessments. ORS 767.840(6). ORS 756.068 delineates the general notice requirements for the Commissioner. It provides:

> "The service or delivery of any notice, order, form or other document or legal process required to be made by the Commissioner may be made by mail. If by mail, service or delivery is made when the required material is deposited in the post office, in a sealed envelope with postage paid, addressed to the person on whom it is to be served or delivered, at his address as it last appears in the records of the Commissioner."

The Commissioner's practice is to use certified mail for all highway use tax assessments greater than $25, thus increasing the probability that actual notice will occur.

This case is substantially the same as State v. Koenig, 218 Or. 86, 342 P2d 139 (1959), except that here the alleged due process violation is more vigorously pressed.

The guidelines for determining whether a particular notice procedure comports with the requirements of due process were established in Mullane v. Central Hanover Tr. Co., 339 U.S. 306, 70 S. Ct. 652, 94 L. Ed. 865 (1950).

> "An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections. *Milliken v. Meyer*, 311 U.S. 457; *Grannis v. Ordean*, 234 U.S. 385; *Priest v. Las Vegas*, 232 U.S. 604; *Roller v. Holly*, 176 U.S. 398. The notice must be of such nature as reasonably to convey the required information, *Grannis v. Ordean, supra*, and it must afford a reasonable time for those interested to make their appearance, *Roller v. Holly, supra*, and *cf. Goodrich v. Ferris*, 214 U.S. 71. But if with due regard for

> the practicalities and peculiarities of the case these conditions are reasonably met, the constitutional requirements are satisfied. 'The criterion is not the possibility of conceivable injury but the just and reasonable character of the requirements, having reference to the subject with which the statute deals.' *American Land Co. v. Zeiss*, 219 U.S. 47, 67; and see *Blinn vs. Nelson*, 222 U.S. 1, 7.
>
> "But when notice is a person's due, process which is a mere gesture is not due process. The means employed must be such as one desirous of actually informing the absentee might reasonably adopt to accomplish it. The reasonableness and hence the constitutional validity of any chosen method may be defended on the ground that it is in itself reasonably certain to inform those affected, compare *Hess v. Pawloski*, 274 U.S. 352, with *Wuchter v. Pizzutti*, 276 U.S. 13, or, where conditions do not reasonably permit such notice, that the form chosen is not substantially less likely to bring home notice than other of the feasible and customary substitutes." 339 U.S. at 314-15.

We conclude that, in a case such as this, where petitioner was aware of the audit, expected notice and resides in this state, the statutory procedure and the procedure followed by the Commissioner fulfills due process standards. There is no method of mailed notice more reasonably calculated to apprise interested parties of the pendency of an action than certified mail.

The rule that where a statute provides for notification by mail, deposit of the notification in the mail satisfies the requiremen's of notice, even though notification is not received, is in accord with Oregon law and the common law and controls here. *See*, State v. Koenig, supra; 1 Merrill on Notice 715-17, § 633 (1952). *See also*, Stroh v. SAIF, 261 Or 117, at 119, 492, P2d 472 (1972).

Reversed.